# EXHIBIT 2

# The New Comprehensive General Liability Insurance Policy

## A Coverage Analysis


*To Increase the Professional Skill and Enlarge the Knowledge of Defense Lawyers*

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November, 1966

# Contents

# Foreword

NOT TOO infrequently the lay public's opinion of insurance policy language parallels, in substance if not exact context, the views of Shakespeare's Prince Hamlet when questioned about the content of a book he was reading – "words, words, words."

Usually the task falls upon members of the insurance industry, attorneys and ultimately judges to explain the meaning of policy definitions, coverages and exclusions. The conclusions often vary. This situation is most often due to the fact that the placement and meaning of these words and phrases varies from clause to clause within the policy and from policy to policy. With this in mind, the insurance industry attempts, whenever and where it can to standardize policy provisions and policies as a whole.

Some seven years ago the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau set out upon the task of standardizing the general liability insurance policy. The product of their efforts, the new standard provisions for the general liability insurance policy, became effective in most states on October 1, 1966.

The purpose of this monograph is to explain these new standard provisions. The author, Willard J. Obrist, brings to this task his extensive experience in the field of insurance. He is the assistant manager of the Syracuse Branch of the General Accident Group. It should be noted that the impressions expressed herein are his own and not necessarily those of his company. Mr. Obrist has addressed the Practising Law Institute in New York twice this year on this subject.

The reader will note that this article is written without citation to authorities. Because standardization of this coverage is quite recent, there have been no reported cases which deal with these provisions. However, a bibliography is included which lists other sources dealing with this subject.

Mr. Obrist's article is followed by an appendix which contains a liability comparison chart. This chart is an outline of the basic differences between the type of coverage which existed before the standardization and the same coverage as it now exists due to standardization. This chart is printed in the appendix with the consent of its publisher, Rough Notes Company, Inc., Indianapolis, Ind., whose kind cooperation is acknowledged.

The Defense Research Institute publishes this monograph for the use of members of the insurance industry, the bench and bar alike with the hope that it will aid them in their work when dealing with these new standardized provisions.

JOHN J. KIRCHER
*Assistant Research Director*

**Obrist, New Comprehensive General Liability Insurance Policy, DRI (Nov. 1966) at 5.**

# New Comprehensive General Liability Insurance Policy

WILLARD J. OBRIST*

## HISTORY

Extensive changes in the liability insurance policies have been promulgated by the National Bureau of Casualty Underwriters and by the Mutual Insurance Rating Bureau. These revisions are probably among the most intensive in the history of casualty insurance. Their preparation took nearly 7 years of research, conferences, and consultations. Whatever one's opinion of the new policy, it cannot be said that it was conceived in haste and hurriedly drafted!

Because the new policy has been so long in preparation and its actual use has been delayed since the initial filing with the various state insurance departments, there has been ample opportunity for all to scrutinize the policy revisions. The courts have not yet had this opportunity but I am quite certain that when they do start interpreting the new policy the results will not always be what the underwriters intended nor what the policy drafters meant to express.

The new standard provisions were made effective in most states on October 1, 1966.

### STANDARD POLICIES

In the casualty insurance field, a standard provisions policy is one adopted by the National Bureau and the Mutual Bureau for use by insurance companies which are either members or subscribers of either bureau. Many companies which are not affiliated with either bureau utilize the policies and endorsement forms which constitute the standard provisions portfolio.

There are no statutory casualty insurance policies as in fire insurance; nevertheless, standardization of casualty policies developed for much of the insurance industry, with the automobile liability form in 1935.

One reason for standardization is to clarify expression of the intended coverage. Saying the same thing in different words may be satisfactory in some fields, but generally it does not work well in the law. Increased use of the same language in standard policies has led to court interpretations which clarify the meaning of the policy language. Thus, both the carrier and the insurance buyer understand the exact scope of coverage.

Standardization also permits pooling of experience by many companies for rate-making purposes. Frequently, this is the only means through which a credible volume of experience data can be obtained for determining the manual rates for the vast majority of the individual classification of risks. Through such pooling, it is reasonably certain that statistics reported to the rate-making organizations represent substantially the same coverage.

The standard policy program does not prevent the insurance company from satisfying the legitimate coverage needs of its customers. Frequently, approved endorsements which amend or modify the coverage have been attached to policies. Such departures from standard language have always been and will continue to be permissible under the standard policy program on an individual risk basis.

## POLICY ANALYSIS

### INTRODUCTION

While this paper is confined to the comprehensive general liability form, because of the revised editorial approach to the drafting of the forms and the many substantive changes, the standard comprehensive automobile liability policy and other standard general liability policies and endorsements have also been revised.

The new policy involves material changes in both substance and form. Need for form change has been clearly indicated by the comments of a number of courts; for example, "The policy contains such a bewildering array of exclusions, definitions and

*Assistant Manager, Syracuse Branch, General Accident Group.

conditions that the result is confounding almost to the point of being unintelligible."

JACKET

The new format will include a standard policy jacket containing all of the common provisions such as policy definitions, conditions, and supplementary payments. Added to this jacket will be various coverage parts: manufacturers and contractors; owners, landlords and tenants; and comprehensive general liability-automobile. Together, these will form a complete policy. There are different ways in which the policy jackets and coverage parts may be printed and assembled, but the wording will be standard.

With such changes an insured needs only to read the particular coverage part which he has purchased, resulting in less confusion for both the insured and the courts.

One rigid rule must be observed in setting up the forms — the coverage exclusions must follow immediately after the coverage provisions. This rule stresses the close relationship between the granting of coverage and its limits and gives equal emphasis to the exclusions. It also clearly establishes that there is no duty to defend a claim for an excluded injury.

The new policy uses more definitions than previous policies and as a result the coverage and exclusions provisions should be less complicated. Defined words or phrases will mean the same thing in the coverage provisions as in the exclusions.

*Occurrence*

A major substantive change is to afford coverage on an occurrence basis. This policy defines "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The word "accident" has been retained to clarify the intent with respect to the time of coverage and the application of policy limits to a particular occurrence. For example, the liability of a contractor arising out of the derailment of 10 or 12 freight cars caused by a collision with a piece of his equipment would be subject to one application of the occurrence limits of the policy. Retention of the word "accident" is limiting in this sense and in no other. Present policies do not define the term "accident."

The "occurrence" definition in the new policy refers to "exposure to conditions which results in injury." Hence, "suddenness" will no longer be a requirement when injury occurs. In the future when deciding whether an occurrence is indicated, we shall deal primarily with the matters of foreseeability and intent.

Although most injuries occur simultaneously with the exposure, there are many instances in which injuries take place over an extended period before they become evident as in slow ingestion of foreign substances or inhalation of noxious fumes.

In some exposure cases involving cumulative injuries, it is possible that more than one policy will afford coverage, each to apply to bodily injury or property damage occurring during its policy period. The policy will not depend upon the causative event of occurrence but will be based upon injuries or damages which result from such an event and which happened during the policy period. It will not be material whether the causative event happened during or before the policy period.

Present policies frequently have been interpreted to apply at the time of a negligent act rather than the time of the accident which caused injury or property damage. Under the new policy, coverage applies when the bodily injury or property damage occurs during the policy period.

The definition of "occurrence" also includes the words "bodily injury or property damage neither expected nor intended from the standpoint of the insured." This phrase is intended to eliminate the necessity for an "assault and battery" condition or exclusion. Further it should eliminate the precedent of court decisions which have applied the concept of fortuity from the point of view of the injured party rather than the insured.

Two factors must be considered in connection with this definition; one involves intent and the other, foreseeability. Whether intention is or is not involved ordinarily does not present special problems although it must be pointed out that while an insured's act might appear to be intentional, he may be incompetent to form such an intent. Further, instances arise when the injury is an unintended result of an intentional act. The two situations, an

absence of intent or an unexpected result, would be covered under either the "accident" or "occurrence" definition.

As to foreseeability, there are a number of cases in which courts denied coverage because it was evident that the damage was clearly foreseeable. For example, coverage was denied where dust and other debris escaped from a building demolition job and damaged merchandise of an adjacent tenant. The definition of "occurrence" and reference to an "unexpected event" would not change the fact that there is no "accident" if the injury was clearly foreseeable or intended.

A new provision sets forth the insured's duties in the event of an occurrence, claim or suit. At his own expense, the named insured must promptly take all reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions. Current policies do not specifically require the insured to take such action. Under the new policy, if the insured does not take steps to prevent added bodily injury or property damage, then any such additional injury or damage would not be really unexpected by the insured. Furthermore, lack of action would probably constitute a breach of the policy condition and would not be covered.

*Property Damage*

The new policy contains a definition of "property damage" as "injury to or destruction of tangible property." This definition is necessary and has been added because present policies have relied on the basic limitation of "caused by accident" to deny coverage for damage to intangible property. This limitation is not available in the new policy, and the definition is included to clarify the underwriting intent.

Under the present policies there has been contention between the insureds and the insurers in regard to the scope and extent of the coverage provided for property damage liability. This controversy has extended to the new policy even though the intention was to clarify the coverage.

The new definition omits any requirement of physical injury as a prerequisite for coverage. The National Bureau states that the policy will cover the insured's legal liability if no specific exclusion applies even though the tangible property is not physically damaged but is made useless by the act of an insured. An example would be the breaking down of a large piece of contractor's equipment on a public street in such a manner that the street must be closed off for a period of time and the public has limited or no access to the stores located in the block affected. Under the definition of "damages" loss of use claims from the operators of these stores would be covered. There is no prerequisite of physical injury to the stores. It seems sufficient that the stores sustained damage when they could not be used for the purpose for which they were designed or intended.

The use of the word "tangible" should not have the effect of restricting coverage under the new policy when compared to the current policy which provides coverage for damage to undefined property. The change for some companies will depend upon how they interpreted the current policy. If their present interpretation is that the current policy limits coverage to a physical injury to tangible property, then the new policy will mean a broadening of coverage.

The new policy should result in more consistent treatment of claims by insurers who use it. The Bureau interpretation should also eliminate many troublesome areas which were an increasing source of litigation regarding questions of coverage between the insured and the insurer.

*Product Liability — Completed Operations*

One of the most important revisions in the new policy arose from the need for clarification of the scope of coverage provided for product liability-completed operations which were never defined before, leading to considerable confusion in claim departments, among insureds and the courts. Decisions have been made which were contrary to the underwriting intent. Some courts held, under the current policies, that the completed operations hazard did not apply separately from the product hazard. This led to the rule that a contractor who does not deal with products as such has no need for completed operations coverage since his manufacturers and contractors insurance which covers operations in progress would also cover his lia-

bility after such operations were completed. Other decisions have declared that if the insured does not manufacture or sell any tangible goods but merely performs services, his activities never fall within the definition of completed operations.

A separate definition has now been established for each hazard and a separate premium charge will be shown for each. The definitions will be physically separated in the policy conditions.

Definitions will provide that the injury or damage, not the accident or occurrence as in the present policy, must happen after the completion of the operations. Some decisions under the current policy held that the accident or occurrence happened at the time of the insured's negligent act during the course of operations, even though the damage occurred later.

Products liability and completed operations definitions include the phrase "reliance upon a representation or warranty made at any time with respect thereto." This restricts the present policy as it pertains to the fitness or quality of the named insured's products or his warranty that the work performed by or on behalf of the named insured will be done in a workmanlike manner. The need for this provision can be illustrated as follows: The insured sold a machine and the salesman told the purchaser that a certain type abrasive wheel could be used safely on the machine. In reliance on this representation a claim was made that the customer bought several such wheels from another supplier and that one of them disintegrated while in use and injured an employee of the purchaser. Since the products coverage was excluded from the insured's policy, the question of whether and when the insured's operation had been completed became an issue. The court said that a negligent representation would not be completed until the person to whom the representation was made acted in reliance upon such representation. In other words, the representation, once made, becomes a never-ending operation and will continue as long as one acts in reliance upon it. Under the new policy such a conclusion would be impossible in view of the revised definitions.

*Completed Operations Hazard*

The definition of "completed operations hazard" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

(1) when all operations to be performed by or on behalf of the named insured under the contract have been completed;

(2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed; or,

(3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractors engaged in performing operations for a principal as a part of the same project.

The definition of completed operations establishes a more precise time at which operations are to be considered completed. An illustration would be a heating contractor who, under a contract with a builder, installs burners in a development consisting of 50 new houses. Possession of a house is taken by the respective owners as soon as each is finished. If a burner explodes and injures the new owner after the heating man has completed his work in that particular house, while he is still working in other houses of the same project, we have the problem of determining whether the injured owner's claim is within the products-completed operations hazard. Another illustration would be the same insured replacing heating radiators in a manufacturing plant. As soon as he completes the installation of the first radiator and while he is working on the second one, the plant manager releases steam into the finished radiator. If, due to a faulty connection some steam immediately escapes from the first radiator and injures a plant laborer, is the laborer's claim against the insured within the products-completed operations hazard? The new policies would be interpreted so that such instances would

be included in the completed operations hazard.

Operations which may require further service or maintenance, correction, repair or replacement, because of any defect or deficiency, but which are otherwise complete, shall be deemed completed. The need for such a clarification can be illustrated as follows. An insured contracted with a hotel to maintain the hotel's elevators for one year and to inspect them once a week. While the contract was still in effect, a passenger was injured when an elevator fell, allegedly due to faulty maintenance work. The insured's policy excluded coverage for products-completed operations and his insurer refused to defend him on the theory that each time the insured's employees left the elevators, which had been serviced regularly, their operations had become completed, and since at the time of the accident there were no employees of the insured working on the elevators, the exclusion applied. The courts disagreed with this theory and held that the insured's operations remained incomplete for the life of the service contract. The new policy definition gives an answer to such situations by clearly explaining that further service or maintenance work has no significance in determining whether operations have been completed.

The "completed operations hazard" does not include bodily injury or property damage arising out of (a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof; (b) the existence of tools, uninstalled equipment or abandoned or unused materials; or (c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations."

### Specific Exclusions

There are certain specific exclusions or changes which have been introduced and which are pertinent to both the products and completed operations hazard.

First of all, the *batch clause* has been eliminated. Reliance will be placed chiefly upon the aggregate limit to establish the cutoff of coverage in the case of catastrophic happenings.

The *design error or business malpractice* exclusion is new and carries out the intent in the products area that coverage is not afforded for the business risk of a manufacturer or contractor. Coverage is excluded when the product or work fails to perform the function or serve the purpose intended by the named insured and is due to a mistake or deficiency in design, formula, specification, etc. This exclusion, however, does not apply to bodily injury or property damage resulting from the active malfunctioning of such a product or work. It is not the intent of the policies to provide coverage for "failure to perform." For example, the exclusion is intended to apply where a pesticide failed to destroy insects which in turn damaged the crop, or if the pesticide actually damages the crop itself. Loss due to a management mistake in designing the formula is excluded. Casualty insurance is not intended to guarantee the performance of the insured's product. Previous policies did not contain such an exclusion and therefore, disagreement arose as to whether such claims were covered under the "failure to perform" rule.

Liability arising out of errors due to employee negligence and not due to faulty design will be covered. Liability arising out of design errors will be covered if the injury results from active malfunction. An example would be the case of a manufacturer of a hair tonic which is intended to prevent falling hair. If a customer who used this product still continued to lose his hair and brought a claim for damages on the ground that the product did not do what it was supposed to do, there would be no coverage if the product had been manufactured according to the insured's formula. If through some mistake on the part of the employee the product was not made according to the manufacturer's intended formula, then there would be coverage. Let us further assume that in addition to failing to halt the falling hair the product actually caused a rash on the customer's scalp. The liability imposed upon the manufacturer for actual injury to the scalp would be covered whether it was an employee mistake or a mistake in design inasmuch as this injury resulted from malfunctioning.

Another new exclusion is *sistership liability or products recall*. This exclusion denies coverage for damages resulting from the withdrawal, inspection, repair, replace-

ment or loss of use of the insured's product or work completed by or for the named insured or to any property to which such products or work form a part, if the withdrawal from the market or from use is because of any known or suspected defect or deficiency in the product or work. The cost of withdrawing the product from the market is not covered. An example would be an airplane crash after which other airplanes of the same type are withdrawn from use.

Another example would be a manufacturer of laundry detergents who, after having sold large quantities of his product to various dealers discovers that the detergent caused instantaneous injuries to the skin due to a formula or production error. The manufacturer tells dealers to withdraw from the market all detergent coming from the same batch. As a result, the dealer suffers substantial damage and presents claims against the manufacturer. The claims of the users who suffered bodily injury would be covered under the products coverage, but the claims of the dealers are not covered. The withdrawal was a deliberate act and damages resulting from it were clearly foreseeable and should not be covered under the current policies or under the new policies covering occurrences.

It is possible that a situation will arise in which an insured refrains from recalling a defective product which is likely to cause injuries. Suppose a manufacturer of a food product discovers, after selling the product to a customer, that it was contaminated, but he deliberately withheld the information and the customer suffers damages when using the product. It seems that this damage is clearly foreseeable and therefore, not caused by accident. In my opinion, there is even less possibility that the damage might be found to have been caused by occurrence. To clarify this intent, the new policies include conditions stipulating the insured's duties in the event of occurrence, claim or suit. If an insured takes the necessary steps to recall his product and then sues the insurer for damages on the theory that he withdrew his product solely because of the obligation imposed by his insurance policy, we believe that the insured's expense is specifically excluded under this condition.

The exclusions dealing with *damage to products or work or alienated premises* has been revised to clarify the intent. Exclusions will apply to the entire unit and not just to a particular part. For example, a manufacturer of house trailers sells a trailer which, while in the purchaser's possession, is subsequently destroyed by a fire which originated from a defective electrical switch in the trailer. A claim for damages is made against the manufacturer who is insured under a policy with products liability coverage. The damage to the insured's product is excluded. However, a controversy frequently arises as to precisely what is the product out of which the accident arose. The policy intent has been to treat the entire trailer as one single unit, but it may be argued that the product out of which the accident arose was the switch and that the exclusion should not apply to the other parts of the trailer. The new exclusion will clarify the intention that there is no coverage.

It should be noted again that one of the major changes in the new policy is to provide an actual separation in the policy between products and completed operations. As indicated, the coverage is related to the injury or damage, not to the negligent act. Regarding completed operations, a more precise time is established in determining when the insured's operations are considered completed.

### Automobile Coverage

The coverage provided for automobiles has undergone several material changes. Presently, coverage for on-premises accidents is provided under general liability policies, even though the automobiles may be owned or operated by or rented or loaned to the insured. We have often wondered why such insurance should apply to such an accident under a general liability policy merely because the accident took place on the insured's premises. This coverage now has been discontinued with two exceptions.

*The first exception pertains to mobile equipment.* The definition is as follows: "*Mobile equipment* means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled; (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned by or rented to the named insured, including the ways immediately adjoining, or (3) designed for

use principally off public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills; concrete mixers (other than the mix-in-transit type); graders, scrapers, rollers, and other road construction or repair equipment; air-compressors; pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment."

Trucks operated for a long period of time at construction sites, farm vehicles, earth moving equipment and contractors' equipment designed or maintained for the sole purpose of affording mobility and which are now being maintained for such a purpose would come under this part of the definition.

*The second exception applies to accidents which are attributable to the parking of an automobile,* not owned by the insured, on premises belonging to the insured. This pertains to risks at hotels, restaurants, clubs and commercial parking areas.

Coverage regarding on-premises loading and unloading by the insured of an independent contractors' automobile is presently afforded under general liability policies; this coverage will continue. In addition, coverage will be extended to include off-premises loading and unloading of independent contractors' automobiles. If the bodily injury or property damage occurs away from the premises due to a loading or unloading operation that has been completed by the insured, coverage will be afforded under the completed operations provision.

It is not intended that coverage be provided for contractual liability with respect to automobiles or aircraft under incidental contracts except as respects independent contractors' operations for the insured. Hence, the contractual exception to the automobile exclusion in the present policies has been removed.

The new policies will include a provision so that registered mobile equipment can be certified under the various financial responsibility laws.

### Liquor Law Liability

Another important exclusion pertains to liquor law liability. The new exclusion parallels an endorsement that is presently in use in several states and is directed toward the common law liability, as well as that imposed by a dram shop law. This exclusion continues to apply only to risks in the business and to owners and lessors of such premises, and is not directed toward exposure under the products hazard. The extension of the exclusion beyond the statute pertains to a minor, to a person under the influence of alcohol, or to one who causes or contributes to the intoxication of any person.

### Third Party Beneficiary

This exclusion in the current policy has now been eliminated. The exclusion was originally intended to prevent insurance for the assumption of absolute liability by the insured with respect to persons with whom the insured had no contractual relationship and to whom the insured would not otherwise be liable. By eliminating this exclusion in the new policy, coverage will be provided under contracts defined in the policy which result in obligations for which the insured may be held liable in an action on a contract by persons not a party to such contract.

### Exhaustion of Policy Limits

The coverage part of the new policy contains a clarification of intent in the form of a new limitation on the duty to defend after the exhaustion of the applicable limit of the insurer's liability by payment in settlement or the satisfaction of a judgment. This is particularly important in the event of an occurrence involving multiple claimants. The new wording makes clear that when the limit of the insurer's liability has been exhausted by payment in settlement or in satisfaction of a judgment the insurer is no longer obligated to pay any further claims or judgments or defend any further suit. This theory has not received the blessing of the courts. Some doubt still remains as to the insurer's obligation to defend claims arising out of the same accident after it has exhausted its limits under the policy.

Under the new policy the defense provision has been made a part of the statement

of coverage in order to express more clearly that the obligation to defend is not a separate and independent insuring agreement. The pertinent provision is as follows: "The Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements."

This is not intended to restrict coverage but rather to clarify, for it was never the intention to provide a defense after the policy limits had been exhausted. Since this has always been the intent, there should be no change in the claim practices of the insurer, but in handling these situations the insurer must act in good faith.

### Policy Territory

The policy territory definition has been modified in two respects. First, coverage has been extended to include bodily injury or property damage occurring in international waters or in air space, provided it is not in the course of travel or transportation to or from a foreign jurisdiction. For example, there is coverage for injuries sustained at the site of off-shore drilling operations as well as between such site and the mainland. There is no coverage for injuries sustained in Europe or in the course of travel or transportation between the United States and Europe.

Secondly, coverage is provided for any liability arising from the sale of goods for use or consumption within the United States, its territories or possessions, or Canada. If such products cause injury anywhere in the world there is coverage, provided the original suit for damages is brought within the basic policy territory. Thus, a retailer has coverage for a claim brought in the United States by a customer who took the product to Europe and suffered injury from the product while abroad. The definitions of "policy period" and "territory" should be read in conjunction with the definition of "occurrence." Coverage is to be construed in reference to bodily injury or property damage which occurs during the policy period and within the policy territory rather than in reference to an "accident."

### Other Insurance

A major change in the "other insurance" clause seems to present a new philosophy designed to provide a more equitable distribution of the loss when there is more than one insurer. The new policy specifically provides that the insurance afforded by the policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When it is primary coverage it shall pay its limit without proration with excess or contingent insurance.

However, where other insurance is found to apply to the loss on the same basis, whether primary, excess, or contingent, the new policy provides for "contribution by equal shares." If both policies have this provision, regardless of the limit, each insurer will pay on a fifty-fifty basis until the loss is paid or the limit of the lesser policy is exhausted. After that, only the policy with the higher limits applies. For example, assume that there is a $50,000 judgment against an insured and that two policies issued by two different insurance companies apply on a primary basis. One policy has a $10,000 limit and the other policy has a $50,000 limit. Under the present policy the entire responsibility would be pro-rated in accordance with the policy limits. The first insurer would pay only $5,000 and the second insurer $25,000. Under the new policy, the first $20,000 of the judgment would be divided equally for payment between the two insurers and the remaining $10,000 would be paid by the second insurer whose limits are higher.

It should be made clear that if the other insurance policies do not provide for "contribution by equal shares," the insurer then shall not be liable for a greater proportion of such loss than the applicable limit of liability of all the collectible insurance against such loss. In other words, we revert back to the present situation when all policies are not on the same basis regarding "other insurance." These changes do not affect the amount of protection the insured has; it merely provides for distribution in a different manner among the insurance carriers.

### Miscellaneous Changes

*The term first aid* has been substituted for the present expenses for "such immedi-

ate medical and surgical relief to others as shall be imperative at the time of the accident." It is believed that "first aid" is an expression well known to most persons as something that takes place very quickly at the scene of the accident with a possible inclusion of ambulance expense to take the injured party from the scene of the accident to a hospital, at which point "first aid" stops. The general public and the courts should more easily understand this term.

Through another change the *definition of bodily injury* no longer refers to "death." Some court decisions have held death as a separate injury if it results at a time subsequent to the bodily injury itself. The reference to "death" is newly included in the definition of "damages" and forces the conclusion that death can only relate to the bodily injury by which it was caused.

The *coverage for incidental contracts* defined in the policy has been broadened to include, without additional premium charge, side-track agreements and easement agreements, not involving construction or demolition operations on or adjacent to a railroad. There is no coverage for automobiles or aircraft under any of the contracts defined in the policy. In view of the nature of the hold harmless agreements in the new policy there is no longer a need to continue the present third party beneficiary exclusion, and the coverage has been broadened in this regard. However, it should be made clear that the third party beneficiary exclusion continues to apply under the separate contractual liability coverage part to those agreements for which an additional premium is charged.

The *water damage liability exclusion* has been eliminated with the exception of Greater New York, resulting in a broadening of the coverage.

The matter of *inspections* has received attention because of recent court decisions holding the insurer liable for negligence in the inspection of a risk. In recognition of this, the inspection condition of the policy has been changed to make it clear that the carrier is not obligated to inspect the insured's property or operations but it does have the right to do so. The condition specifically provides that neither the existence nor exercise of the right to inspect shall constitute an undertaking to determine or warrant that the property or operations are safe.

The *bail bond allowance* has been increased from $100 to $250.

*Expenses incurred by the insured* at the company's request will include actual loss of wages or salary not to exceed $25 per day because of the insured's attendance at hearings or trials.

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# Appendix

## LIABILITY COMPARISON CHART*

### BASIC DIFFERENCES IN NEW AND OLD LIABILITY PROGRAMS

| 1966 PROGRAM | 1955 PROGRAM |
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| Jacket contains standard provisions basic to all divisions of General Liability insurance. Appropriate coverage parts are attached to afford desired insurance, making more clear the scope of coverage afforded. | Schedule General Liability policy approach afforded up to five divisible units of coverage (divisions of insurance) in any combination. Complex form led to uncertainties over extent of effective coverage. |
| **SUPPLEMENTARY PAYMENTS** | |
| *Supplementary Payments* provision is included in the basic policy jacket, as it is applicable to any coverage part that might be combined with the jacket. | *Supplementary Payments* provision followed the Definition of Hazards as one of the Insuring Agreements in the Liability policies. |
| Covered premiums on bonds to release attachments are clarified as relating to suits defended by the company, just as in the case of appeal bonds. | Premiums on bonds to release attachments were covered but they were not related to defended suits, though that was the intent. |
| Provides under Supplementary Payments section of basic policy jacket for coverage of bail bond cost required because of accident or traffic law violation arising out of the use of any vehicle to which the policy applies, not to exceed $250 per bail bond. Company is not obligated to furnish such bonds. | The Bail bond coverage was only provided under Automobile Liability policies, and the cost was not to exceed $100 per bail bond. |
| Provides that the insured be reimbursed for reasonable expenses, incurred at the company's request, including actual loss of wages or salary (but not loss of other income), not to exceed $25 per day, because of attendance at hearings or trials. | Loss of earnings not reimbursed by company. However, coverage for all reasonable expenses incurred by the insured at the company's request not limited to a per diem limit, nor limited to only attendance at hearings or trials. |
| **DEFINITIONS** | |
| *Automobile* is defined to make clear which vehicles are within the scope of the automobile exclusion in the coverage parts and which are mobile equipment and not excluded. Machinery and apparatus attached to a covered vehicle are also covered, as they are an integral part. | *Automobile* is defined with reference to equipment that is or is not within the definition, depending on circumstances. Gray areas and uncertainties developed from the operations of various insureds. |

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| 1966 PROGRAM | 1955 PROGRAM |
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| **DEFINITIONS—(Continued)** | |
| *Explosion ("X")* and *Collapse ("C")* exclusions do not apply to property damage within meaning of *Underground Damage ("U")* exclusion. Collapse exclusion applies to damage to building or structure and any other property resulting therefrom. | *"X," "C" and "U" exclusion* intent was similar but language was found wanting in face of court testing of policy application. |
| *Completed Operations* hazard is defined separately from *Products* hazard. It requires that injury or damage, rather than the accident, occur after operations are completed. Point at which operations are "completed" is carefully defined to make clear where insurance for "operations in process" ends and that for "completed operations" is necessary. | *Products-Completed Operations hazard* was defined as a single concept, leading to belief that insured not handling products did not require Completed Operations insurance. Language resulted in negligent act, not resulting injury, determining time of accident. Distinction between "operations" and "completed operations" disputed. |
| *Damages* defined to include an affirmative statement that loss of services and loss of use of property are within the scope of covered damages, without ruling out other consequential damages. | *Damages* not defined but companies have recognized the consequential losses to be proper charges under third party liability claims. |
| *Incidental Contracts* newly include sidetrack agreements, and easement agreements not involving construction or demolition operations on or adjacent to a railroad. | *Incidental Contracts,* those basically insured under Premises-Operations coverage without declaration or charge, did not include sidetrack and easement agreements. |
| *Mobile Equipment* is described in an affirmative manner to make clear those vehicles to which General Liability, rather than Automobile Liability insurance applies. | *Mobile Equipment* did not include vehicles providing mobility to various items of heavy contractors' equipment. (Such equipment is now spelled out precisely and in detail.) |
| *Occurrence* is described not only as an accident, but also exposure to conditions which may continue for days, weeks, months or even years. There is no "occurrence" until an injury results from a happening. Injury or damage must occur during the policy period to be covered, and may neither be expected nor intended from the standpoint of the insured. Because of this clarification in definition it is not necessary to include the Assault and Battery clause. Court cases which, contrary to intent, had previously considered accidents from the claimant's standpoint should be overcome. | Policy basically covers only for *accidental* injury or damage. The intent of the policy was to cover only injuries and damage caused by events that were: unintended; unexpected; and sudden and therefore identifiable in time and place. X |
| *Policy territory* is defined to include: the United States of America, its territories or possessions, and Canada. International waters or air space is included in the policy territory, provided the injury or damage does not occur in the course of traveling | *Policy territory* confined to accidents occurring within the United States of America, its territories or possessions, and Canada. |

| 1966 PROGRAM | 1955 PROGRAM |
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| **DEFINITIONS—(Continued)** | |
| to or from foreign jurisdictions. Coverage applies worldwide with respect to injury or damage arising out of a product which was sold for use or consumption within the described territory, provided suit for damages is brought within such territory. | |
| *Products hazard* is defined separately from the *Completed Operations* hazard. It requires that injury or damage, rather than the accident, must occur after relinquishment of possession and away from premises owned by or rented to the insured. A reference is made in the definition to representations and warranties. | *Products-Completed Operations hazard* was defined as a single concept. Recent court decisions have held that by interpretation of the liability policy the completed operations hazard did not exist independently from the products hazard. Definition was based on "accident" occurring after possession of products had been relinquished to others. This led to court decisions holding that the negligent act, and not the injury, is the accident. |
| *Property Damage* is defined to limit coverage for injury to or destruction of tangible property, since policy is on an "occurrence" basis. The use of the words "tangible property" is designed to exclude such property rights as patent infringement, plagiarism, loss of profits, goodwill, etc. Loss of use may be covered without prior physical damage to property. | *Property Damage* meant injury to or destruction of property, including the loss of use thereof, caused by accident. Policy was interpreted not to cover loss of use of property unless resulting from prior physical damage. |
| **CONDITIONS** | |
| The condition applying to *Premium* has been considerably simplified. Definitions of various premium bases, e.g., "admissions," "costs" and "receipts," etc., have been omitted, since the schedule approach can be eliminated. | Policy stated under the condition applying to *Premium* various definitions of words, such as "admissions," "costs," "receipts," etc., used as premium bases. This was necessary when company wrote coverage on the schedule approach, as OL&T and M&C policies. |
| *Inspection and Audit* condition has been modified to indicate that the company has the right but not the obligation to inspect the insured's property and operations. The condition also specifically provides that neither the existence nor exercise of the right to inspect shall constitute an undertaking to determine or warrant that the property or operations are safe. | *Inspection and Audit* condition provided that the company has the right to inspect the insured's premises and operations. This condition freely interpreted by the courts permitted third party claims against insurance companies alleging engineering and safety inspections were negligently performed. |
| *Financial Responsibility Laws* condition is new. It is added since it is contemplated that certain General Liability policies may be used to certify registered "mobile equipment" under the various state Financial Responsibility Laws. | There was no *Financial Responsibility Laws* provision under the policy, since mobile equipment was considered an automobile while operated for locomotion, and therefore excluded off premises in General Liability policies. |

| 1966 PROGRAM | 1955 PROGRAM |
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| **CONDITIONS—(Continued)** | |
| *Insured's Duties in the Event of Occurrence, Claim or Suit,* is the condition in the new policy which replaces the *Notice of Accident, Notice of Claim or Suit* and *Assistance and Cooperation* conditions of the old policy. It is specifically spelled out that the expense of avoiding the recurrence of injury from the same cause is an obligation of the insured, not the company. | The same provisions are available under separate conditions related to *Notice of Accident, Notice of Claim or Suit* and *Assistance and Cooperation of the Insured.* |
| Under the *Other Insurance* condition it is made clear, contrary to certain court decisions, that when the insurance is intended to be primary, it shall pay its limits without proration with excess or contingent insurance.<br>Also provides for a more equitable distribution of loss between companies so that when two policies apply on the same basis and the other insurance has the same provision, each company would pay equal amounts of the loss up to the point where limits of the lower limit policy are exhausted. If the other insurance does not have the same provision, the insurance reverts to same method as under the old policy. | The *Other Insurance* condition provides that if the insured has other insurance against a loss covered under the policy, the company is not liable for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance. |
| The *Assignment* condition follows language of old policy but has been expanded to cover also temporary custodians of any property of the named insured, if he should die. | The *Assignment* condition provides coverage only for the named insured's legal representative in the event of the named insured's death. |
| *Three Year Policy* condition provides that, if a policy is issued for a period of three years, the limits of the company's liability shall apply separately to each annual period of the term. Audit period is annual unless otherwise stated in declarations. | It was optional with companies to incorporate a condition having the same net effect. The condition established procedure for computation and adjustment of earned premium at end of each annual period. Some companies endorsed three-year policies to make this clear. |
| **COMPREHENSIVE GENERAL LIABILITY** | |
| Affords full scope of General Liability coverage of non-contractual nature. Separate coverage part required for contracts other than "incidental contracts," making clear there is not effective Contractual Liability insurance without it. | Comparable comprehensive protection afforded, but provisions for Contractual Liability included with other insuring agreements. Questions arose whether protection for contracts was effective. |
| Exclusions are integrated with grant of coverage, giving them equal prominence. Makes clear there is no duty to defend claim for damages for excluded injury. | Exclusions located distant from coverage agreements, giving rise to claims insureds were misled by obscure placement of exclusions after broad coverage grant. |

| 1966 PROGRAM | 1955 PROGRAM |
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| **COMPREHENSIVE GENERAL LIABILITY—(Continued)** | |
| Coverage broadened by insuring liability for both bodily injury and property damage on an "occurrence" basis rather than a "caused by accident" basis. | Coverage confined basically to liability arising from "accidents." Endorsement of individual policies to "occurrence" basis usually limited to bodily injury. |
| Water Damage Liability coverage included with limited exception in Greater New York. | Liability for water damage not covered by means of specific exclusion. |
| "Liquor law" exclusion broadened so there is no protection for common law responsibility for the sale of liquor. This exclusion applies only to insureds engaged in the liquor business and to owners and lessors of premises used for the purpose. | The exclusion eliminated coverage only for liability of an insured in the liquor business (and owners and lessors of such premises) arising from a dram shop law. |
| *Note: Completed Operations and Products Liability included. See pertinent comparison following.* | |

## OL&T AND M&C LIABILITY

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| Coverage parts limited in scope, intended for use only when insurance for premises, operations in progress and, if existent, elevators is needed. Schedule approach, making possible the combination of divisions of insurance, abandoned. CGL recommended for use when full scope of General Liability insurance wanted. | Schedule type policies involved five units of coverage: Premises-Operations; Elevators; Structural Alterations in OL&T and Independent Contractors in M&C; Products; and Contractual. Ambiguities and uncertainties over scope of effective coverage developed. |
| Both Bodily Injury and Property Damage insurance on an "occurrence" basis. Concept includes injury from prolonged exposure to conditions. | Insurance written on a "caused by accident" basis under basic policy provisions, contemplating only sudden events. |
| Covered "incidental" contracts newly include easement agreements not involving construction work on or adjacent to a railroad, and sidetrack agreements. | Not covered as "incidental" contracts under Premises-Operations unit. |
| Coverage is afforded for "operations in progress" rather than "operations." | Coverage of "operations" resulted in court decisions holding that contractors do not need "completed operations" coverage because they did not handle products. |
| Water Damage Liability coverage included with limited exception in Greater New York. | Liability for water damage not covered by means of specific exclusion. |
| "Liquor law" exclusion broadened so there is no protection for common law responsibility for the sale of liquor. This exclusion applies only to insureds engaged in the liquor business and to owners and lessors of premises used for the purpose. | The exclusion eliminated coverage only for liability of an insured in the liquor business (and owners and lessors of such premises) arising from a dram shop law. |

| 1966 PROGRAM | 1955 PROGRAM |
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| **CONTRACTUAL LIABILITY** | |
| Coverage broadened to an "occurrence basis," the approach of the revised basic OL&T, M&C and CGL coverage parts. | Coverage confined basically to liability arising from "accidents." Endorsement of individual policies to "occurrence" basis usually limited to bodily injury. |
| Insurance not applicable to bodily injury or property damage arising out of professional services performed by them. *(Professional Liability insurance covers the exposure.)* | No comparable exclusion, giving rise to claims for damage from faulty opinions, specifications, engineering service, etc. for which insurance not intended. |
| Water Damage Liability coverage included with limited exception in Greater New York. | Liability for water damage not covered by means of specific exclusion. |
| The Contractual Liability insurance coverage part provisions must be used to cover liability expressly assumed under a written contract or agreement. | Contractual Liability insurance optional in CGL and schedule Liability policies, resulting in claims, though the coverage was not made effective, because of incorporated provisions. |
| **COMPLETED OPERATIONS AND PRODUCTS LIABILITY** | |
| Coverage included in CGL coverage part, which should be used if all General Liability hazards are to be insured. Separate Completed Operations and Products Liability coverage part used with jacket when only those hazards are to be covered. Do not use separate form with OL&T and M&C coverage parts. | Completed Operations and Products Liability provisions incorporated in CGL and schedule OL&T and M&C Liability policies. Made effective by completing declarations or schedule. Presence of insuring agreements, though not effective, created problems. |
| Completed Operations and Products hazards are separated to meet court decisions which did not make the intended distinction. | Separation attempted by endorsement after experience with adverse court decisions. |
| It is clearly indicated that coverage is related to the injury or damage and not to the intentional act. Recent decisions held that the negligent act and not the injury is the accident, defeating need for Products Liability insurance. | No similar provision. |
| Use of "operations in progress" to describe basic division of insurance in CGL, OL&T and M&C coverage parts sharply distinguishes it from "completed operations." | Reference to Premises-Operations hazard led to contention Completed Operations insurance included in the basic Liability division. |
| More precise time established in determining when insured's operations completed, viz, the earliest of the following times: | No such precise guide. |

| 1966 PROGRAM | 1955 PROGRAM |
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| **COMPLETED OPERATIONS AND PRODUCTS LIABILITY—(Continued)** | |
| 1) When all operations completed.<br>2) Where more than one job site, then when all operations at one job site are completed.<br>3) When portion of work has been put to its intended use. | |
| "Business risk" specifically excluded. Production errors covered but not failure to perform intended function because of design mistake. | No comparable distinction. |
| "Sistership liability" specifically excluded. Claims by retailers, e.g., alleging financial loss, not covered if manufacturer recalled entire lot of defective product for safety reasons. | No comparable exclusion. |
| **PERSONAL INJURY LIABILITY** | |
| Group B offenses more fully expressed:<br>Reference to "other defamatory or disparaging material" acknowledges intent to cover trade libel and other competitive torts (except for advertisers and broadcasters.)<br>Division between violations of right of privacy in Group B and invasion of right of private occupancy in Group C made clear. | No comparable provisions. |
| Exclusion relative to injury arising from employment of a claimant narrowed by reference to such a person by the "named insured" rather than "any insured." | No such clarification. |
| Slanderous remarks covered only within policy period when *first* injurious utterance occurs. | Absence of clarification led to coverage if insurance secured after potential claim developed. |
| **COMPREHENSIVE AUTOMOBILE LIABILITY** | |
| Both Bodily Injury and Property Damage Liability insuring agreements are stated as a single paragraph together with the obligation to defend suits. Coverage is broadened to an "occurrence" basis. | Bodily Injury Liability and Property Damage Liability were two separate and distinct insuring agreements. The Defense of Suit provisions were incorporated in a separate section of the policy. Coverage was on a "caused by accident" basis. |
| Coverage is afforded only for damages, "to which this insurance applies," making it clear that insurance is not afforded for legal liability arising from injury or damage that is excluded from coverage. | No such explicit provision in the policy, but the intent was the same. |

| 1966 PROGRAM | 1955 PROGRAM |
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| **COMPREHENSIVE AUTOMOBILE LIABILITY—(Continued)** | |
| Company has no obligation to pay claims or judgments or to defend suits after the applicable policy limit has been exhausted. | There is no similar provision in the policy. |
| Individual partners as well as executive officers are defined as insureds in respect to use of non-owned automobiles in the business, eliminating the need for the "Partnership as Named Insured" endorsement. | Policy covered under Definition of Insured only the named insured and executive officers with regards to use of non-owned automobiles in the business. Partners could be covered if the basic policy was endorsed. |
| Policy excludes insured's liability arising out of the use of non-owned automobiles in partnership or joint venture operations, unless policy indicates coverage by declaring the partnership or joint venture to be a named insured. Insurance also does not apply to an automobile owned by or registered in the name of an individual partner, if the named insured is a partnership. | No similar provisions. Partnership or joint venture operations were covered only if policy were endorsed to cover the partnership as a named insured. |
| Specific provision is made in the insuring agreement for coverage arising out of loading or unloading operations. | No specific provision in the policy for coverage of loading or unloading operations, often creating confusion as to whether this was covered under the Automobile or the General Liability policy. |